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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 16, 1997

Michael G. Wilkie, Chief of Police
Springdale Police Department
2915 Platt Springs Road
Springdale, South Carolina 29170

Re: Informal Opinion

Dear Chief Wilkie:

You have asked whether the offenses of speeding and DUI (1st offense) constitute double jeopardy. It is my opinion that they do not.

Law / Analysis

In State v. Easler, _____ S.C. _____, 471 S.E.2d 745 (1996), the South Carolina Court of Appeals recently held that prosecutions for felony DUI causing death together with reckless homicide and felony DUI causing great bodily injury with ABHAN did not constitute double jeopardy. The Court noted that

> [t]he Double Jeopardy Clause of the Fifth Amendment "'protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) ... . "Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Brown, 432 U.S. at 165, 97 S.Ct. at 2225.

Request Letter

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471 S.E.2d at 756-7. The Court of Appeals also stated that the "established test" for whether two offenses are the same was set forth in Blockburger v. United States, 284 S.C. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932). In Blockburger the United States Supreme Court had held that

> [t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

The South Carolina Court of Appeals then quoted at length from the recent case of State v. Lewis, _____ S.C. _____, 467 S.E.2d 265 (Ct. App. 1996) which had traced the "circuitous and serpentine history of Blockburger ... ." In Lewis the Court had described the history of the double jeopardy test as follows:

> [a] defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two "distinct" offenses. State v. Walsh, 300 S.C. 427, 388 S.E.2d 777 (1988). In Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), the United States Supreme Court set forth the following analysis for determining whether a subsequent prosecution was barred by the double jeopardy clause. The court had to first apply the traditional test under Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), which requires a technical comparison of the elements of the offense for which the defendant was first tried with the elements of the offenses in the subsequent prosecution. If the Blockburger test revealed that the offenses had identical statutory elements or that one was a lesser included offense of the other, then the inquiry must cease and the subsequent prosecution was barred. Id. If, however, a subsequent prosecution survived this technical comparison of the elements of the two offenses, the court had to then determine whether the State could prove the entirety of the conduct previously prosecuted to establish an essential element of the offense in the subsequent prosecution. If so, the subsequent prosecution was barred. Id. The Grady v. Corbin analysis relied on a determination of whether one offense was a "species of lesser-

> included offenses" of the other. See State v. Wilson, 311 S.C. 382, 429 S.E.2d 453 (1993) (discussing and applying the Grady v. Corbin analysis).
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> Grady v. Corbin was overruled, however, in United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). A majority of the United States Supreme Court found Grady's "same conduct" test lacked constitutional roots, and was wholly inconsistent with Supreme Court precedent and "the clear common-law understanding of double jeopardy." United States v. Dixon, 509 U.S. at 688, 113 S.Ct. at 2860. Accordingly, Grady is no longer the law, and Blockburger remains as the only test of double jeopardy for successive prosecutions as well as for multiple punishments in a single prosecution. See generally McAninch, Double Jeopardy: The Basics for Practitioners, Criminal Practice Law Report, April and May 1994 (two parts).
> Lewis, 467 S.E.2d at 266-67.

Easler, 471 S.E.2d at 757.

Applying the Blockburger test, the Court rejected defendant's double jeopardy argument in both instances. First, the Court of Appeals found that "[r]eckless homicide is not a lesser-included offense of felony DUI causing death, but is a distinct offense requiring proof of different elements." In other words, "[s]pecifically, reckless homicide," concluded the Court, "requires a proof of recklessness, while felony DUI causing death does not." Id. at 758. With respect to the felony DUI and ABHAN prosecutions, the Court held that "[j]uxtaposing the offenses of ABHAN and felony DUI causing great bodily injury under the elemental test of Blockburger, felony DUI causing great bodily injury requires proof of intoxication; whereas ABHAN does not require such proof. Therefore, felony DUI causing great bodily injury and ABHAN do not satisfy the 'same elements' test under Blockburger." 471 S.E.2d at 758.

Cases from other jurisdictions support the view that the offenses of DUI and speeding do not constitute double jeopardy. See Blum v. County Court of Larimer Co., 631 P.2d 1191 (Colo. Ct. App. 1981); Commonwealth v. Butt, 406 Pa. Super. 526, 594 A.2d 743 (1991); State v. Valle, 1986 W.L. 9937 (1986); Pate v. State, 488 So.2d 508 (Ala. 1985); and State v. Cospal, 626 So.2d 1013 (Fla. 1993)

In Butt, the Court reasoned as follows:

> [i]t is clear that the DUI prosecution here is not barred by application of the Blockburger test. The summary offense of speeding requires proof that the defendant was driving in excess of the maximum speed limit, which DUI does not. Likewise, DUI requires proof that the defendant was under the influence of alcohol to the extent specified in the statute, which speeding does not require. Therefore, each contain at least one element which the other does not, and thus survive the Blockburger test.

594 A.2d at 744. In Valle, the Court opined that "there is no doubt that prosecution on a driving under the influence charge after defendant had pled guilty to a speeding charge would not violate the Double Jeopardy Clause." And in Blum, the Court concluded that "[w]here, as here, the state charge contains elements and requires evidence fully distinct from that required by the municipal prosecution for the first charge [for speeding], there is no double jeopardy." 631 P.2d at 1192.

Thus, it is my opinion that there is no double jeopardy involved for the charges of speeding and DUI, first offense. See also, Op. Atty. Gen., No. 88-39 (May 3, 1988) [traffic violation and DUI charges neither constitutes double jeopardy nor requires election pursuant to § 22-3-740 even where the two charges arise out of the same incident].

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an